

<b>Mohssen v Gonzalez</b>
2020 NY Slip Op 34283(U)
December 23, 2020
Supreme Court, Kings County
Docket Number: 510925/15
Judge: Lawrence S. Knipel
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At an IAS Term, Part 57 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 23<sup>rd</sup> day of December, 2020.

P R E S E N T:

HON. LAWRENCE S. KNIPEL,

Justice.

-----X

FAHTI MOHSSEN,

Plaintiff,

- against -

Index No. 510925/15

RUBEN GONZALEZ,

Defendant.

-----X

The following e-filed papers read herein:

NYSCEF Doc. Nos.

Notice of Motion/Order to Show Cause/  
Petition/Cross Motion and  
Affidavits (Affirmations) Annexed\_\_\_\_\_

141-148

Opposing Affidavits (Affirmations)\_\_\_\_\_

149-152

Reply Affidavits (Affirmations)\_\_\_\_\_

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Upon the foregoing papers in this action regarding a property dispute, defendant Ruben Gonzalez (Gonzalez) moves (in motion sequence [mot. seq.] 11) for an order, pursuant to CPLR 5015, vacating the November 14, 2019 order granted on default and restoring the action to the calendar.

Plaintiff Fahti Mohssen (Mohssen) commenced this action against his neighbor, Gonzalez, on September 4, 2015, alleging that Gonzalez “has a fence encroaching on” Mohssen’s property. On December 20, 2018, the court (Baynes, J.) granted Gonzalez’s cross motion for summary judgment and denied Mohssen’s summary judgment motion.

Mohssen filed a motion to reargue. Gonzalez subsequently amended his answer to assert an easement and adverse possession as affirmative defenses.

Gonzalez's counsel, Jeanette Malaty, Esq., affirms that Mohssen's motion to reargue was adjourned several times because Justice Baynes, the judge who rendered the original decision and order on the parties' summary judgment motion and cross motion, was unavailable. According to attorney Malaty, when she appeared in court on October 10, 2019, she was told that the motion to reargue was adjourned to December 4, 2019. Attorney Malaty affirms that she checked the court's electronic filing system (E-Courts) a few days later to confirm that the next appearance was scheduled for December 4, 2019, and she entered the appearance date on her calendar. However, attorney Malaty affirms that "unbeknownst to me, the court later advanced the case to November 14, 2019 and rendered a judgment on default in favor of the plaintiff."

Gonzalez now requests that the court vacate the November 14, 2019 order and restore the action to the calendar because he has both a reasonable excuse for the appearance default and a meritorious defense to the action, since he "has already been granted summary judgment after oral argument based on the fact that [his] property contains and has always contained the steps, stoop, and the chimney located on the strip of land in dispute."

Mohssen, in opposition, argues that Gonzalez's instant motion to vacate "should be denied in its entirety as it fails to address the primary issue why the Defendant's

counsel failed to appear in court on the return date and a meritorious defense.” Mohssen’s counsel claims that the notice of the new court date was on E-Courts, which is how his office was aware of the court date. Mohssen also disputes that Gonzalez has a meritorious adverse possession defense because a “major” issue raised was that the parties’ properties were jointly owned until 2012. Mohssen claims that “[t]he parties, neighbors, had separate properties for only three years prior to the commencement of the litigation at most and therefore adverse possession cannot be justified . . .”

Gonzalez’s counsel, in reply, reiterates that she had a reasonable excuse for the appearance default because “the proceeding was advanced to a date nineteen days earlier” than the December 4, 2019 return date, and “[i]n the fifteen years that I have been practicing, I have had cases administratively adjourned to later dates, but never to an earlier date.” Gonzalez’s counsel notes that she was “very surprised” when her office received a copy of the default judgment in the mail, which was when she first became aware that the return date had been advanced to November 14, 2019. Gonzalez argues that “plaintiff is attempting to take unfair advantage of an administrative glitch which advanced this case from December 4, 2019 to November 14, 2019, in order to prevail in an action that had already been decided on December 20, 2018 when this court granted summary judgment to the defendant.”

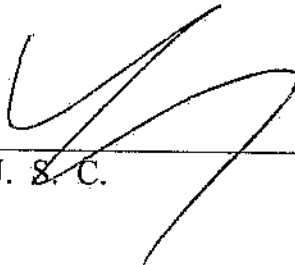
“In order to vacate a default in opposing a motion pursuant to CPLR 5015 (a) (1), the moving party is required to demonstrate a reasonable excuse for his or her default and

a potentially meritorious opposition to the motion” (*Rocco v Family Ctr.*, 94 AD3d 1077, 1079-1080 [2012]). Here, Gonzalez has established a reasonable excuse for his default in appearing at the November 14, 2019 oral argument on Mohssen’s motion to reargue. Gonzalez’s failure to appear at oral argument was neither willful nor deliberate. Furthermore, a cursory review of the parties’ moving and opposing papers submitted on Mohssen’s motion to reargue reflect that Gonzalez has a potentially meritorious opposition to the motion.

Accordingly, in the interest of justice and absent any prejudice to Mohssen, Gonzalez’s instant motion is granted in its entirety, the case is restored and the order dated November 14, 2019 is vacated.

This constitutes the decision and order of the court.

E N T E R,



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J. S. C.

Justice Lawrence Knipel